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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of)
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Amendment of Section 73.202(b),)
Table of Allotments,)
FM Broadcast Stations.)
(Exmore and Cheriton, Virginia, and)
Fruitland, Maryland))

MM Docket No. 99-347
RM-9751
RM-9761

To: The Chief, Allocations Branch,
Policy and Rules Division,
Mass Media Bureau

REPLY COMMENTS OF CUMULUS LICENSING CORP.

Cumulus Licensing Corp. ("Cumulus"), the licensee of 220 ^{1/} commercial AM and FM radio broadcasting stations throughout the United States, by its undersigned attorneys and pursuant to Sections 1.415 and 1.420 of the Commission's Rules, hereby respectfully submits these Reply Comments in response to the Commission's *Notice of Proposed Rule Making* in the above-captioned proceeding ("*NPRM*"), 14 FCC Rcd 21170 (1999).

^{1/} Cumulus has closed on the acquisition of four stations since it submitted its Comments in this proceeding on January 31, 2000, at which time it was the licensee of 216 stations.

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The *NPRM* sought comment on two interrelated petitions for rule making to amend the Table of Allotments for FM Broadcast Stations, both involving the community of Exmore, Virginia. Be-More Broadcasting (“Be-More”), the permittee of a new FM station on Channel 291B1 at Exmore, seeks the reallocation of Channel 291B1 from Exmore to Cheriton, Virginia and the modification of Be-More’s construction permit (File No. BPH-19951109MC) in order to specify Cheriton in lieu of Exmore as the station’s community of license. Great Scott Broadcasting (“Great Scott”), the licensee of Station WKHI (FM) on Channel 298B at Exmore, requests the substitution of Channel 298B1 for Channel 298B, the reallocation of the substituted channel to Fruitland, Maryland, and the modification of Station WKHI (FM)’s license in order to specify operation on Channel 298B1 at Fruitland in lieu of operation on Channel 298B at Exmore.

Comments were filed by Cumulus, Be-More, Great Scott, Sound Enterprises, Inc. (“Sound”), and Exmore-Nassawadox Radio Partners (“ENRP”). In light of the information provided in these Comments, it is clear that Be-More has submitted the only petition that can be granted in this proceeding. Great Scott’s proposal does not justify a waiver of the prohibition against removing a community’s sole existing local transmission service, and the allocation of a new channel to the community of Nassawadox, Virginia would not compensate Exmore for the loss of such a service. By contrast, as set forth in the Comments of Cumulus and Sound, Be-More’s proposal does

not create the same concerns regarding removal of “service” because it involves removing a channel for an unbuilt station, while Great Scott seeks to remove a station that has a long operating history in the community.

1. Great Scott’s Proposal Does Not Offer *Rare Circumstances* Permitting the Removal of Exmore’s Sole Existing Local Transmission Service

As the Comments filed in this proceeding by Cumulus and Sound clearly demonstrate, the Commission generally prohibits the removal of an existing service representing a community’s sole existing local transmission service. *See Modification of FM and TV Authorizations to Specify a New Community of License, Memorandum Opinion and Order (“Reconsideration Order”), 5 FCC Rcd 7094, 7096 (1990)*. The Commission has stated that it will only consider requests to waive that prohibition “. . . in the **rare circumstances** where removal of a local service might serve the public interest” *Id.* (emphasis added).

The example given by the Commission of such “rare circumstances” is the provision of a first reception service -- representing fulfillment of the highest of the Commission’s four FM radio broadcasting channel allotment priorities ^{2/} -- to a

^{2/} The four priorities are, in descending order of importance: (1) first full-time aural service; (2) second full-time aural service; (3) first local service; and (4) other public interest matters. *See Revision of FM Assignment Policies and Procedures*, 90 FCC 2d 88 (1982).

significantly sized population. *Id.* Although Great Scott argues that several factors support its proposal, those factors surely fail to satisfy the Commission's very high standard for "rare circumstances." For example, Great Scott asserts in its Comments that a grant of its petition would result in the community of Fruitland gaining its first local transmission service. Great Scott Comments at 8. However, the creation of a new local transmission service for one community (Fruitland), at the expense of a sole existing local transmission service to another community (Exmore), is insufficient to warrant a waiver of the prohibition. *See Reconsideration Order*, 5 FCC Rcd at 7096. Moreover, Great Scott's argument only reaches the third allotment priority -- provision of a local transmission service to Fruitland -- which does not comport with the Commission's example of "rare circumstances" in the *Reconsideration Order*, namely, a fulfillment of the first allotment priority. *See* note 2, *supra*, and associated text. Great Scott further argues that its proposal would eliminate a *nighttime* grey area containing 647 people, would provide an additional service for a net 62,076 people, and might allow the allotment of a new channel to Cheriton. Great Scott Comments at 8. Although such factors may offer some support in certain channel allotment proceedings, in light of the example given by the Commission in the *Reconsideration Order*, it is clear that they do not amount to "rare circumstances" justifying the removal of Exmore's sole existing local service. The elimination of nighttime grey area only addresses the second of the four allotment priorities -- provision of a second service -- and then only partially (only at night) and insignificantly (affecting only 647 people), and again falls short of the "rare

circumstances” example cited in the *Reconsideration Order*, namely, fulfillment of the first allotment priority. Similarly, the other factors cited by Great Scott fall short of the first allotment priority (the provision of an additional service to a net 62,407 people reaches only the fourth priority and the allotment of a first local transmission service to Cheriton addresses only the third priority). *See* note 2, *supra*. Moreover, any service benefits that might result from Great Scott’s proposal would have to be weighed independently against the community of Exmore’s legitimate expectation that Station WKHI’s service will continue. *Reconsideration Order* at 7097. Substantial weight must be accorded to that expectation. *Eatonton and Sandy Springs, Georgia, and Anniston and Lineville, Alabama*, 6 FCC Rcd 6580, 6586 (Chief, Mass Media Bureau, 1991).

2. The Potential Station in Nassawadox, Virginia Does Not Amount to a Local Service for the Community of Exmore

The Comments filed by Be-More, Great Scott, and ENRP point out that the community of Nassawadox, Virginia was recently allotted Channel 252A. Be-More Comments at 1; Great Scott Comments at 2, n.3; ENRP Comments at 2. ENRP states that if it becomes the permittee of the new Nassawadox station, it will originate programming responsive to the needs of the residents of Exmore. ENRP Comments at 2. ENRP concludes that the Commission “should not consider Exmore a community without radio service if both proposals in this proceeding are granted.” *Id.* (emphasis in original). ENRP further apparently seems to go so far as to propose that the Commission

amend the FM Table of Allotments to reflect “Nassawadox-Exmore” as the community of license for Channel 252A. *Id.* at 3.

Despite the potential future grant of a permit for Channel 252A in Nassawadox, Exmore would still lose its only existing local service if Great Scott’s proposal were to be granted. Further, ENRP has not provided sufficient information for the Commission to consider its proposal to amend the Table of Allotments in the manner requested, *i.e.*, a so-called “hyphenated” allotment to the two communities of Nassawadox and Exmore.

First, the potential station in Nassawadox is not a substitute for an existing local service to Exmore. As demonstrated in Cumulus’s Comments, the Commission has recognized that “. . . the potential for service at some unspecified future date is a poor substitute for the signal of an operating station that can be accessed today by simply turning on a . . . radio set.” *Reconsideration Order, supra*, 5 FCC Rcd at 7097. In this instance, not only is the Nassawadox station unbuilt, it does not even have a permittee. Nor is there any guarantee that this potential station would serve the needs of Exmore; to the contrary, as a station licensed to Nassawadox, its principal programming obligation will be to address the community needs of Nassawadox, not of Exmore. Thus, the removal of Station WKHI’s channel to Fruitland would still result in the community of Exmore losing its only local aural transmission service.

ENRP has not provided information sufficient for the Commission to amend its Table of Allotments to specify the new community of license for Channel 252A as Nassawadox-Exmore, Virginia. Hyphenation of two communities is an allotment tool that the Commission uses very sparingly. *Eatonville, Washington*, 7 FCC Rcd 4639, n.1 (Chief, Allocations Branch, 1992), *citing Gardnerville-Minden, Nevada*, 48 Rad. Reg. 2d (P&F) 1700 (1981); *Canton, Georgia, et al.*, 3 FCC Rcd 737 (1988). The Commission has done so “. . . only where it appeared that the communities should be treated as one due to the proximity and mutual economic, cultural and social interdependence.” *Eatonville, supra*, 7 FCC Rcd 4639 at n.1. In addition, the petitioner proposing a hyphenated, two-community allotment is usually required to show that neither community standing alone could support a station. *Id.* Other than pointing out that Nassawadox is located six miles from Exmore, ENRP has not attempted to make any such showing, nor is it likely that such a showing is possible, since for many years Exmore alone (without the benefit of Nassawadox) has supported Station WKHI.

3. The Commission Should Grant Be-More’s Petition Because it Seeks to Remove the Channel for an Unbuilt Station Rather than an Existing Service

In light of the Commission’s policy against removing a community’s sole local transmission service, and the fact that Be-More proposes to remove the channel upon which an unconstructed station would operate, while Great Scott seeks to remove Exmore’s only operating local radio station, it is clear that only Be-More’s petition can be

granted in this proceeding. As illustrated in Cumulus's Comments, the removal of an existing service from a community causes more concern than the removal of a channel supporting an unbuilt station, because the public has not come to rely on service from an unconstructed station. *See, e.g., Sanibel and San Carlos Park, Florida*, 10 FCC Red 7215, 7217 (Chief, Allocations Branch, 1995). Be-More's Comments concerning the "community" attributes of Cheriton provide adequate indicia to satisfy the Commission's relatively liberal standards of what constitutes a community for allotment purposes. *See* Be-More Comments at 2-3.

In light of the foregoing, the Commission should grant Be-More's petition for rule making and deny the petition for rule making filed by Great Scott.

Respectfully submitted,

CUMULUS LICENSING CORP.



By: John Griffith Johnson Jr.
Bruce D. Ryan
Kathrine L. Calderazzi

PAUL, HASTINGS, JANOFSKY &
WALKER, LLP
1299 Pennsylvania Avenue, N.W.
Tenth Floor
Washington, DC 20004-2400
Telephone: (202) 508-9500
Facsimile: (202) 508-9700

February 15, 2000

Its Attorneys

CERTIFICATE OF SERVICE

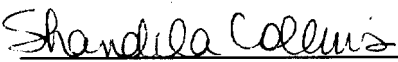
I, Shandila Collins, a secretary in the law firm of Paul, Hastings, Janofsky & Walker, LLP, do hereby certify that true copies of the foregoing Reply Comments of Cumulus Licensing Corp. were sent this 15th day of February 2000, by first-class United States mail, postage prepaid, to the following:

A. Wray Fitch, III
Gammon & Grange, P.C.
8280 Greensboro Drive
Seventh Floor
McLean, Virginia 22102-3807
(Counsel to Be-More Broadcasting)

Ross G. Greenberg
Leventhal, Senter & Lerman, P.L.L.C.
2000 K Street, N.W.
Suite 600
Washington, D.C. 20006-1809
(Counsel to Great Scott Broadcasting)

Howard J. Braun, Esq.
Shelley Sadowsky, Esq.
Rosenman & Colin LLP
805 15th Street, N.W.
Washington, D.C. 20005
(Counsel to Sound Enterprises, Inc.)

Cary S. Tepper, Esq.
Booth, Freret, Imlay & Tepper, P.C.
5101 Wisconsin Avenue, N.W.
Suite 307
Washington, D.C. 20016-4120
(Counsel to Nassawadox-Exmore Radio Partners)



Shandila Collins